Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

Michael M. McAfee, d/b/a McAfee MX
Petitioner

Vs.

Rick Foster,
Phillip Fitzgerald
James and Sherri Estrada
Ray and Gabrielle Fletcher
Steve and Sandy Fairfield
Tim Hitchcock and Haden Cowdry
Respondents.

On Petition For Writ Of Certiorari
To the Court of Appeals,
Second District of Texas-Fort Worth

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the Federal Noise Control Act (Noise Control Act) of 1972, 42 U.S.C. 4901 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provision of the Act, 42 U.S.C. 4911(a)?

2) Does a private citizen have standing to maintain a federal common law nuisance action for alleged damages sustained resulting from motorized vehicle noise emissions as a general federal question under 28 U.S.C. 1331?

3) If any federal common law nuisance action exists for alleged damages sustained resulting from motorized vehicle noise emissions, if available to a private citizen, is not said action preempted by the present regulatory scheme governing motorized vehicle noise emissions established by the Federal Noise Control Act (Noise Control Act) of 1972?

QUESTIONS PRESENTED - CONTINUED

4) Does a state abuse its police powers in enjoining a private entity under a state common law theory of nuisance when the plaintiff's unclean hands are adjudged as unassigned error?

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellant below):

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Respondents (plaintiffs and respondents below):

RICK FOSTER
PHILLIP FITZGERALD
JAMES AND SHERRI ESTRADA
RAY AND GABRIELLE FLETCHER
STEVE AND SANDY FAIRFIELD
TIM HITCHCOCK AND HADEN COWDRY

Represented by Brian P. Lauten, Esq., THE LAUTEN FIRM, 2626 Cole Avenue, Suite 850 Dallas, Texas 75204

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CITATIONS FOR OPINIONS BELOW

The opinion of the state Court of Appeals (Appendix A) is not reported but is found at (WL 3228008 (Tex. Civ. App. – Fort Worth 2008)). The state trial court's final judgment and permanent injunction (Appendix B), the decision of the Supreme Court of Texas denying review (Appendix C) and the order of the Supreme Court of Texas denying the petition for rehearing (Appendix D) were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The state Court of Appeals filed its opinion on February 7, 2008. The Texas Supreme Court denied petitioner's petition for review on June 27, 2008 and denied petitioner's motion for rehearing on August 15, 2008. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review on writ of Certiorari the opinion of the Court of Appeals, Second District of Texas-Fort Worth.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the petitioner pursuant to 42 U.S.C. §1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The petitioner alleges that the Respondents violated his rights under the Tenth and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

> ***Tenth Amendment:*** "The powers not delegated to the United States by the Constitution, nor prohibited to it by the ☞

States, are reserved to the States respectively, or to the people."

Fourteenth Amendment (Section 1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner owns and operated, prior to Respondent's being granting injunction, a unique agricultural business operation which included a public recreational motocross track and fish farm on his property located in a rural, unincorporated area of Cooke County, Texas. Respondents brought suit at common law for equity, without claiming monetary damages, in state district court in late March 2006. Petitioners alleged the motocross track to be a private and public nuisance and a nuisance

per se, and alleged violations of the Texas Penal Code. In Respondent's First Amended Petition of May 4, 2006, Respondents additionally alleged "E.P.A. (Environmental Protection Agency) Violations", specifying motorcycle engine noise emissions were at issue. Petitioner argued that he was not a nuisance, as he was of public benefit and was operating a legal business not in violation of any statue or ordinance.

At pre-trial proceedings and at jury trial, the record revealed that:

(1) while Respondents plead nuisance per se, they plead no viable cause of action establishing nuisance per se under §125 of the Texas Civil Practice and Remedies Code;

(2) while Respondents plead public nuisance, that Petitioner was never cited under Texas Penal Code §42.01 for public nuisance, nor was ever warned prior to possible citation, as required by said statue;

(3) that the jury question spoke exclusively as to whether Petitioner was a private nuisance to Respondents;

(4) that Respondents' expert witness relied heavily upon "a 1977 EPA study that concluded two and four-stroke engines . . . would harm the community when the noise systematically exceeded fifty-five decibels" App. 5.

(5) Petitioner repeatedly and consistently objected to any and all federal subject matter (E.P.A.) questions, testimony, arguments, exhibits, etc. RR1 at 14; RR2 at 40; RR3 at 20, 55-58; and RR9 at 5, 28-37, 45, 64, 66, 68, 70-72, and 74.

After the jury trial, the state trial court judge signed an order and judgment on December 19, 2006 in favor of Respondents, granting permanent injunction. (Appendix C). Petitioner then filed a timely motion for new trial.

During the hearing on said motion, Petitioner offered into the record undisputed testimony by Petitioner's expert witness that Respondents lacked clean hands, as they had enhanced audio levels on videotape entered into evidence at trial. RR13, at 31-34. Additionally, Petitioner attempted to enter into the record correspondence from Mr. Kenneth E. Feith, Senior Scientist/Policy Advisor for the E.P.A.'s

Office of Policy Analysis and Review in Washington D.C. (Appendix F), which states in pertinent part:

> "The A-weighted 55 decibel (55 dBA) sound level represents a "time averaged," continuous sound that is measured over a specified time period, generally 24 hours. This level is referred to as the "Equivalent Sound Level" (Leq). And is a single number value that contains all variations in sound amplitude that occur during the specified time period. Consequently, a Leq 55 dBA may contain peak levels in excess of 100 dBA as well as low levels of 20 dBA that when time averaged result in the 55 dBA. This is explained in detail in the referenced document.
>
> It should be noted that the EPA document does not mandate community noise limits. The levels stated therein are the result of a national noise survey where community noise levels were measured and then correlated with the response of persons exposed to the noise. **The 55 dBA does not represent a**

> **level of noise that poses a health or safety risk to the public.** Rather, it represents the "time averaged" noise level where the average person will express some level of annoyance." App. 25-26.

The state trial court dismissed this correspondence as hearsay, and denied Petitioner's motion.

In January 2007 Petitioner filed a timely appeal with the (Texas) Second Court of Civil Appeals in Fort Worth. The Court of Appeals rendered its judgment and issued a Memorandum Opinion in favor of Respondents on February 7, 2008 (Appendix A) and subsequent judgment (Appendix B).

Of particular note is footnote 21 in the Court of Appeals opinion:

> "McAfee also argues that appellees should not have been granted equitable relief because they lacked clean hands. James Appleton, an expert in forensic video and audio analysis, testified in a bill of exception at the

> hearing on McAfee's motion for new trial that the audio on appellees' DVD showing their sound readings had been altered. McAfee, however, does not argue that the trial court improperly denied his motion for new trial; thus we do not address this argument. *See Pat Baker Co. v. Wilson,* 971 S.W.2d 447, 450 (Tex. 1998) (holding that appellate court cannot reverse a trial court's judgment on unassigned error)." App. 10-11.

In February 2008 Petitioner filed a timely motion for rehearing with the Court of Appeals, which was denied on March 6, 2008. Petitioner then filed a timely motion with the Court of Appeals to challenge subject matter jurisdiction by federal questions and preemption on March 25, 2008.

The basis of Petitioner's action continuing his questioning subject matter jurisdiction, and for the jurisdiction of the Court of Appeals, is well grounded in the Tenth and Fourteenth Amendments, 28 U.S.C. §1343(3), and Texas case law. *Texas Association of Business v. Texas Air Control Board,* 852 S.W.2d 440, 443-446 (Tex. 1993); *State Bar of Texas v. Gomez,* 891 S.W.2d 243, 245 (Tex, 1994);

Sivley v. Sivley, 972 S.W.2d 850, 855 (Tex. App-Tyler 1998, orig. proceeding); *Continental Coffee Products Co. v. Cazarez;* 937 S.W.2d 444, 449 n.2 (Tex. 1996); *Mapco, Inc. v. Forrest,* 795 S.W.2d 700, 703 (Tex. 1990).

As Petitioner had not received a reply from the Court of Appeals as to his motion to challenge subject matter jurisdiction, and the planetary power of said court was set to expire, Petitioner filed a timely Petition for Review to the Supreme Court of Texas on May 20, 2008. Two days thereafter on May 23, 2008, the Court of Appeals ruled against Petitioner's motion.

The Supreme Court of Texas denied Petitioner's Petition for Review on June 27, 2008 (Appendix D). On July 11, 2008 Petitioner filed a timely motion for rehearing, which was denied August 15, 2008 (Appendix E).

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REASONS FOR GRANTING CERTIORARI

Petitioner asserts that the State of Texas has violated his constitutional rights under the 10th and 14th amendment through abuse of its police powers; in acting upon issues involving federal questions and

which is subject to federal preemption. Petitioner asserts that Respondents' specifying "E.P.A. Violations" in their well-pleaded complaint under the color of state law circumvents the federal questions raised under 42 U.S.C. §4901 *et seq.*, (Noise Control Act of 1972) and the subsequent regulatory scheme established by Congress for motorized vehicle noise emissions under 40 CFR §205.150, *et seq.* Petitioner asserts that Respondents have no standing in a state forum to ask questions regarding motorized vehicle noise emissions, unless a private right of action exists, separate from the Noise Control Act's citizen's suit provision, 42 U.S.C. §4911(a). Petitioner also asserts that Respondents may not alternatively file a federal common law nuisance action, as Congress has preempted the field of motorized vehicle noise emissions. While this Court has answered these questions regarding numerous other federal statutes, it has not done so in reference to the Noise Control Act.

Petitioner additionally asserts that as Respondents' entire cause of action turned upon evidence which Petitioner's expert witness' undisputed testimony showed to be an act of Respondents' unclean hands, though adjudged unassigned error by the state Court of Appeals (App. 10), merits review by this Court; as (1) it is well

established that clean hands is equity's maxim, and (2) that state courts of last resort are in direct conflict as to whether said court may reverse in civil cases where unassigned error exists.

This case this unambiguously presents basic questions as to whether private common law nuisance actions, when said alleged nuisance arises from motorized vehicle noise emissions, must be heard in a federal forum:

1) Does a private right of action exist under 42 U.S.C. §4901 *et seq.*, independent of the citizen's suit provisions of said act?

2) May private citizens file a federal common law nuisance action for alleged damages as a general federal question under 28 U.S.C. §1331?

3) If a private citizen files such an action, is not said action preempted by the regulatory scheme established by Congress under 42 U.S.C. §4901 *et seq.* and 40 CFR §205.150 *et seq.*?

This case also unambiguously presents an additional question worthy of review by this Court:

Does a state deny equal protection when it does not grant reversal in a civil case where plaintiff's unclean hands exists, but is adjudged as unassigned error?

While this Court has decided Petitioner's first three questions as they relate to Acts of Congress from the same historical period; e.g., the similarly crafted Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. (& Supp. 1) 1251 *et seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972 33 U.S.C. (& Supp. 1) 1401 *et seq.*, *Middlesex County Sewerage Authority, et al. v. National Sea Clammers Association, et al.* 453 U.S. 1; it has not spoken to these questions as they relate to 42 U.S.C. §4901 *et seq.* Petitioner humbly asserts that it is for this Court to decide these important issues of federal law.

1. THIS COURT'S DECISIONS CLARIFY WHEN A PARTY INVOKES FEDERAL JURISDICTION UNDER THE WELL-PLEADED-COMPLAINT RULE

Petitioner asserts that Respondents' plea of "E.P.A. Violations" calls for response in a federal forum, as Respondents failed to rely solely on state

law. Count Two on the face of Respondents' 1st Amended Petition of May 4, 2006, under the heading "Count two: NUISANCE PER SE/CRIMINAL AND E.P.A. VIOLATIONS" states in pertinent part: "Specifically, the E.P.A. has adopted regulations with respect to motorcycle noise and recognizes that noise in excess of fifty-five decibels harms the public health, safety, and welfare." This Court has held that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint" *Caterpillar v. Williams* 482 U.S. 386 (1987) and "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law" *Id.* The issue here is simple and clear. Either Petitioner committed some 'E.P.A. violation', or he did not. But when Respondents plead as a cornerstone of their state common law case, a claim of "E.P.A. Violations", the question becomes one which Petitioner asserts a state court may no longer adjudicate. Respondents have succeeded in an artful pleading by not mentioning the Noise Control Act; but then trying to hide behind the coattails of state common law to ask a state court if an 'E.P.A. Violation' concerning motorized vehicle noise emissions has been committed. A plaintiff cannot disguise as a state claim a cause of action that is necessarily federal in

nature. *Geopel v. National Postal Mail Handlers Union,* 35 F3d 306 (3d Cir. 1984). This Court has understood for nearly 100 years that:

> "whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute[,] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson,* 234 U.S. 74 (1914).

Petitioner asserts that this Court, not a state court, has the authority under 28 U.S.C. §1331 and Article VI, Section Two of the U.S. Constitution to decide this, or any other issue involving exercise of federal powers. What ultimately is at issue is whether Petitioners have standing to file a private right of action in the state forum they have chosen, out of a private right of action granted by federal authority. If not, then one question remains: may Petitioners file a federal common law nuisance action, or is such action preempted by the federal

regulatory scheme in 42 U.S.C. §4901 *et seq.* and 40 CFR §205.150 *et seq.*? Only this Court can decide these important questions.

2. THIS COURT'S DECISIONS CLARIFY THAT NO PRIVATE RIGHT OF ACTION EXISTS IN FEDERAL STATUTES WORDED SIMILARLY TO THE NOISE CONTROL ACT

Petitioner looks to the wording of the citizen's suit provision of the Clean Water Act, 33 U.S.C. §1365(a) and the savings clause of the Clean Water Act, 33 U.S.C. §1365(e), and compares them to their respective counterparts in the Noise Control Act, 42 U.S.C. 4911(a) (citizen's suit provision) and 42 U.S.C. 4911(e) (savings clause). The wording of the two citizen's suit provisions are nearly identical and the wording of the two savings clause(s) are identical verbatim. This Court, in *Middlesex*, clarified Congressional intent in the wording of the Clean Water Act's (and Marine Protection, Research and Sanctuaries Act's) citizen's suit provision and savings clause:

"These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and

private citizens." *Middlesex,* at 13. "These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes." *Id.,* at 14.

> "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the MPRSA and FWPCA. As we stated in *Transamerica Mortgage Advisors, supra,* "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 444 U.S., at 19, 100 S. Ct., at 247. See also *Touche Rosss & Co. v. Redington, supra,* at 571-574, 99 S. Ct. at 2486-2488. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.,* at 14-15.

"Where, as here, Congress has made clear that implied private actions are not

contemplated, the courts are not authorized to ignore this legislative judgment." *Id.*, at 18.

"We hold that there is no implied right of action under these statutes . . ." *Id.*, at 11.

Petitioner does not desire to bore this Court with a rehashing of *Middlesex*. He simply asserts that this Court's careful reasoning in *Middlesex* logically should be applied to the Clean Water Act's sister legislation; the similarly worded Noise Control Act. Petitioner again asserts that no right of action, save the citizen's suit provision of said Act at 42 U.S.C. 4911(a), with the proper 60-day notice as required by 42 U.S.C. 4911(b), is available to any litigant making a claim of "E.P.A. Violations" pertaining to motorized vehicle noise emissions.

3. THIS COURT'S DECISIONS CLARIFY THAT A PRIVATE CITIZEN NO HAS STANDING TO MAINTAIN, IN THE ALTERNATIVE, A FEDERAL COMMON LAW NUISANCE ACTION AS SAID ACTION IS PREEMPTED BY THE REGULARTORY SCHEME OF FEDERAL STATUTES WORDED SIMILARLY TO THE NOISE CONTROL ACT

Petitioner asserts that Congress has preempted the field of two and four-stroke motorcycle engine noise emissions under 42 U.S.C. §4901, *et seq.,* and its regulatory scheme, 40 CFR §205.150 *et seq.* Article VI, Section Two of the U.S. Constitution (Supremacy Clause) gives Congress preemptive power over any state law conflicting with the exercise of federal power, and this Court has spoken accordingly. *Fidelity Federal Savings & Loan v. De La Cuesta,* 458 U.S. 141, 152-153 (1982). This Court has stated that state law may be preempted by explicit, field, and conflict preemption. *English v. General Electric C.,* 496 U.S. 72 (1990). This Court has stated that under field preemption, state law is preempted when it regulates conduct in a field that Congress intends the federal government to occupy exclusively. *International Paper Company v. Ouellette* 479 U.S. 481, 492 (1987) and "'federal law or regulations may impliedly preempt state law or regulations in the state's scope' indicates that Congress intended federal law or regulations to occupy the field exclusively." *Freightliner Corporation v. Myrick,* 514 U.S. 280, 287 (1995). Even if Congress does not completely occupy a given regulatory field, state law is preempted to the extent it conflicts with federal law. *Geier v. American Honda Co., Inc.,* 120 S. Ct. 1913, 1920 (2000).

This Court has stated that any state law (to include claims under state law) is a form of regulation subject to the Supremacy Clause. *Id.* at 1928; *San Diego Building Trades Counsel v. Garmon,* 359 U.S. 236, 247 (1959). It does not matter whether the 'state law' is a statute, ordinance, common law, or tort law; it is preempted when such state standard is in conflict with the objectives of the federal law. *Id; Silkwood v. Kerr-McGee Corporation,* 464 U.S. 238, 256 (1984).

Congress has made clear its intent to preempt the field of motorized vehicle engine noise:

1) "the Congress finds" it is a "major source of noise" 42 U.S.C. §4901(a)(2)

2) "Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment" 42 U.S.C. §4901(a)(3)

3) "The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare" 42 U.S.C. §4901(b)

4) in "authoriz[ing] the establishment of Federal noise emission standards for products distributed in commerce" *Id.*

5) by declaring "The Administrator shall . . . publish information on the levels of environmental noise the attainment and maintenance of which in defined areas under various conditions are requisite to protect the public health and welfare with an adequate margin of safety" 42 U.S.C. §4904 (a)(2); and

6) specifically includes "Transportation equipment (including recreational vehicles and related equipment)" and "any engine or motor" thereof 42 U.S.C. §4905(a)(1)(C)(ii) and (iii).

Petitioner again points to this Court's decree in *Middlesex,* "Finally, the Court of Appeals failed to take account of the rest of the enforcement scheme expressly provided by Congress...." *Middlesex,* at17. Applying the four-factor test this Court established in *Cort v. Ash* 422 U.S. 66, 78, 95 to the Noise Control Act, it becomes clear why this Court concluded, regarding the Clean Water Act that " . . . the federal common law of nuisance has been fully

pre-empted in the area of ocean pollution." *Middlesex,* at 11. Petitioner thus asserts that the federal common law of nuisance has been fully preempted in the area of motorized vehicle noise emissions.

4. WHILE THIS COURT'S DECISIONS CLARIFY THAT CLEAN HANDS IS EQUITY'S MAXIM, STATE COURTS OF LAST RESORT ARE IN CONFLICT AS TO REVERSAL ON UNASSIGNED ERROR WHERE UNCLEAN HANDS EXIST

The doctrine of clean hands is so well established that Petitioner need only to restate the maxim that "he who comes into equity must come with clean hands" and cite the appropriate cases decided by this Court: *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.,* 324 U.S. 806 (1945); *Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240 (1933).

The state Court of Appeals Memorandum Opinion states it cannot grant equitable relief to Petitioner, by granting his motion for new trial, as they proclaim Respondents' unclean hands to be unassigned error; and that an appellate court in

Texas "cannot reverse a trial court's judgment on unassigned error." *Pat Baker Co.*, App. 10-11.

Petitioner would show this Court that at least one state court of last resort that has taken the completely opposing position concerning reversal for unassigned error in civil cases. *Maddux v. Maddux*, 475 N.W.2d 524 (1991) involves a non-custodial parent's failure to pay child support. In this case, the Supreme Court of Nebraska stated:

> "The Supreme Court always reserves the right to correct error unassigned or uncomplained of but which is plainly evident from the record and prejudicially affects a litigant's substantial right, and which if left uncorrected would result in a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process, regardless of whether the error was raised at trial or on appeal." *Maddux*, at 526.

This Court has stated that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson*, 349 U.S. 133, 136 (1955).

Petitioner asks this Court whether two courts of last resort, coming to diametrically opposing conclusions concerning reversal for unassigned error in civil cases, is permissible under the powers granted the states by the 10th Amendment, or a violation of equal protection rights granted U.S. citizens by the 14th Amendment.

5. FAILURE TO IMMUNIZE THE ACTIONS AT ISSUE HERE WILL CREATE PROBLEMS CONGRESS INTENDED TO AVOID IN CREATING THE NOISE CONTROL ACT

If the Respondent's conduct at issue in this action is not made subject to federal, and not state authority, then litigants disliking any motorized vehicle noise emissions above 55 dBA will build upon this precedent. Using claims of "E.P.A. Violations" and the studies authorized under 42 U.S.C. §4901 *et seq.;* Respondents would hide under the color of state law in a state common law nuisance action, to meet their ends in the absence of a defendant's violation of state statute or ordinance. Respondents' tactic, if allowed to stand, becomes an attempt to 'legislate by litigation' and create a new scheme more restrictive than, and contrary to, Congressional intent. 42 U.S.C. §4905(e)(1)(A) makes clear that:

> "No state or political subdivision thereof may adopt or enforce . . . with respect to any new product for which a regulation has been prescribed by the Administrator under section, any law or restriction which sets a limit on noise emissions from such new product and which **is not identical** to such regulation of the Administrator"

But the State of Texas has allowed Respondents to set such new, non-identical limits, more restrictive than those established under the authority of the Noise Control Act, (at 40 CFR §205.152 for two and four-stroke motorcycle engines). While 42 U.S.C. §4905(e)(2) says that states may "establish and enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products", they may only do so when said statute, regulation, etc., is not in conflict with existing federal statutes or regulatory schemes. Respondents' tactic ultimately makes every motorized vehicle noise emission subject to their new, 55 dBA "law". This is certainly not Congress' intent, as it would increase product costs dramatically and discourages technological

development. "If a state law is an obstacle to the accomplishment and execution of the full purpose and objective of Congress by interfering with the methods employed in the federal scheme, the state law is preempted." *Geier,* at 1921. The State of Texas has made it impossible for Petitioner, or anyone with a motorized vehicle, to comply with the existing federal regulatory scheme and the "new" scheme the states has created. This Court has stated that a state law is preempted if the regulated party cannot comply with both the state and federal regulation. *Hillsborough County v. Automated Medical Labs, Inc.* 471 U.S. 701, 713 (1985).

CONCLUSION

The decision of the Texas Supreme Court, in denying review of the opinion of the Texas Second Court of Appeals-Fort Worth, opens a wide door for anyone using the Respondents' theory to file an action for nuisance under state common law where motorized vehicle engine noise exceeds 55 dBA. Without instruction from this Court, all purchaser's of federally approved motorized vehicles are subject and vulnerable to legal action based upon the new standard establish by Respondents'. This is outside the scope intended by Congress and subjects said purchasers of otherwise federally approved products

to unequal protection under the law. The true nuisance is the undermining and circumventing by states of Congressional intent and preemption in this field. Only this Court can decide whether this door shall remain open. Accordingly, Petitioner most humbly and respectfully urges this Court to grant this petition for writ of certiorari.

DATED: November 11, 2008

Most Humbly & Respectfully submitted:
/S/: Michael M. McAfee, Pro Se

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-07-00080-CV

MCAFEE MX D/B/A MCAFEE MOTO CROSS AND MICHAEL M. MCAFEE	APPELLANTS
V.	
RICHARD FOSTER,PHILLIP FITZGERALD,JAMES AND SHERRI ESTRADA, RAY AND GABRIELLE FLETCHER, STEVE AND SANDY FAIRFIELD, TIM HITCHCOCK, AND HADEN COWDRY	APPELLEES

FROM THE 235TH DISTRICT COURT
OF COOKE COUNTY

MEMORANDUM OPINION [1]

Appellants McAfee Mx d/b/a McAfee Moto Cross and Michael McAfee (collectively, "McAfee") appeal from the trial court's final judgment and permanent injunction. We affirm.

[1] See TEX. R. APP. P. 47.4.

McAfee operated a motorcross course on his land near Gainesville, Texas. The course consisted of two tracks—one for adults and one for children—and ran four days a week from 9 a.m. or noon until dusk. Richard Foster, Phillip Fitzergerald, James and Sherri Estrada, Ray and Gabrielle Fletcher, Steve and Sandy Fairfield, Tim Hitchcock, and Haden Cowdry (collectively, "appellees") are McAfee's neighbors, residing or working within 1100 feet of McAfee's property. In 2006, appellees sued to permanently enjoin McAfee from operating the motocross course, claiming it was a nuisance due to the excessive noise and dust it produced, among other problems.

The trial court granted a temporary restraining order and later a temporary injunction. Following a two-day jury trial, the trial court rendered judgment and issued a permanent injunction in favor of appellees. McAfee appeals.

In his first and second points, McAfee challenges the legal and factual sufficiency of the evidence to support the jury's finding that his operation of the motocross track substantially interfered with appellees' use and enjoyment of their land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving

weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact.[2] In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable fact-finder could and disregard evidence contrary to the finding unless a reasonable fact-finder could not.[3]

An assertion that the evidence is factually insufficient to support a fact finding means that the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered.[4] We are required to consider all of the evidence in the case in making this determination, not just the evidence that supports the finding.[5]

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[2] Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex.1998), cert. denied, 526 U.S. 1040 (1999); Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Tex. L. Rev. 361, 362-63 (1960).

[3] City of Keller v. Wilson, 168 S.W.3d 802, 807, 827 (Tex. 2005).

[4] Garza v. Alvair, 395 S.W.2d 821, 823 (Tex. 1965).

[5] Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 406-07 (Tex.), cert. denied, 525 U.S. 1017 (1998).

A nuisance is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.[6] Foul odors, dust, noise, and bright lights may constitute a nuisance if sufficiently extreme.[7] The amount of annoyance or inconvenience that must be produced to constitute a nuisance depends on the varying facts of each case.[8]

At trial, many of the appellees and two neighbors who were not parties to the lawsuit testified that McAfee's motocross tracks substantially interfered with the use and enjoyment of their land. Fitzgerald described the sound from the tracks as thirty chainsaws in a neighbor's backyard and stated that it was hard to carry on a conversation outdoors. Ray Fletcher testified that the constant noise prohibited entertaining and reading outside. Hitchcock found there was "no way" to play sports outside with his family and that his horse required tranquilizer in order to be shoed while the tracks were in operation. Foster also stated that his family could not have an outdoor picnic "because you couldn't speak to each other" and that his horses would spook on part of his property.

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[6] Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W. 3d 264, 269 (Tex. 2004).

[7] Id.

[8] Gulf Oil Corp. v. Vestal, 231 S.W.2d 523, 525 (Tex. Civ. App.—Fort Worth 1950), aff'd, 149 Tex. 487, 235 S.W. 2d 440 (1951).

Sherri Estrada claimed that the noise from the tracks prevented her grandchildren from fishing and playing outside. Sandy Fairfield, who owned a storage business across the street from the tracks, stated that it was difficult to work there because of the constant noise, analogizing the sound to a bunch of jack hammers.[9] Several witnesses also discussed odor and dust problems.

Further, Mike Fann, an engineer specializing in noise and vibration control, opined that appellees' complaints were "absolutely reasonable." Fann considered a 1977 EPA study that concluded two- and four-stroke engines (the types used on McAfee's tracks) would harm the community when the noise systemically exceeded fifty-five decibels. Fann also referred to Texas Penal Code section 42.01, the disorderly conduct statute, which creates a presumption that "a noise is...unreasonable if the noise exceeds a decibel level of 85 after the person making

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[9] McAfee contends that appellees' subjective testimony was outlandish and exaggerated and that their opinions were not "rationally based" as required by Texas Rule of Evidence 701; thus, he has waived any complaint that the testimony was inadmissible for that reason. See Tex. R. App. P. 33.1 (a); Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g). Further, jurors are the sole judge of the credibility of the witnesses and the weight to give their testimony, and we must assume jurors decided all credibility questions in favor of the verdict if reasonable people could do so. City of Keller, 168 S.W. 3d at 819. After reviewing the record, we conclude that a jury could reasonably have found appellees credible.

the noise receives notice from a magistrate or peace officer that the noise is a public nuisance."[10] Fann concluded that twenty or more motorcycles a day on the tracks would exceed the eighty-five decibel benchmark "on a regular basis," and one of the loudest bikes would surpass eighty-five decibels even at a distance of 1422 feet.[11] Officer Toby Bean's testimony that he received a sound reading of ninety-six decibels from the tracks corroborated Fann's conclusions, and the jury saw a DVD made by appellees showing sound readings in the sixty and seventy decibel range.

McAfee testified that he did not think motorcycles were loud, and another witness denied having any difficulty carrying on a conversation while visiting the tracks. Further, McAfee presented expert testimony that controverted appellees' expert to some extent.[12]

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[10] See Tex. Penal Code Ann. 42.01(a)(5), (c) (2) (Vernon 2003 & Supp. 2007).

[11] The number of motorcycles on the track on any given day varied, but McAfee claimed he did not allow more than forty riders on the track at a time. Officer Toby Bean recalled seeing twenty or thirty motorcycles at the track when he was there, and one weekend in August 2005 brought a total of 132 motorcycles to the track.

[12] McAfee's expert Kevin Ware testified that when measuring sound, a time-weighted average is more accurate than an instantaneous reading because sound levels fluctuate, and noise ordinances are based on time-weighted averages. Ware surmised that the measurements appellees recorded with their sound meter were instantaneous readings.

In sum, appellees presented testimony that McAfee's motocross activities substantially interfered with their use and enjoyment of their land by causing unreasonable discomfort and annoyance to them, and they offered expert testimony supporting this testimony. Applying the appropriate standards of review, we hold that the evidence was both legally and factually sufficient to support the jury's nuisance finding. Accordingly, we overrule McAfee's first and second points.

In his third point, McAfee argues that the trial court erred in granting a permanent injunction because the trial court's balancing of the equities was not supported by legally or factually sufficient evidence.

Abatement of a lawful business is a harsh remedy, and even when the jury finds that a nuisance exists, the trial court should balance the equities in order to determine if an injunction is appropriate.[13] The trial court should consider injury that may result to the defendant or the public by granting the injunction as well as injury suffered by the plaintiffs if the injunction is denied.[14] Public convenience or necessity, economic burden to the defendant, and the

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[13] Storey v. Cent. Hide & Rendering Co., 148 Tex. 509, 514-15, 226 S.W. 2d 615, 618-19 (1950); Lee v. Bowles, 397 S.W. 2d 923, 926-27 (Tex. Civ. App.—San Antonio 1965, no writ); Fargason v. Econ. Furniture, Inc., 356 S.W. 2d 212, 215 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

[14] Storey, 148 Tex. At 514-15, 226 S.W. 2d at 618-19.

Adequacy of a legal remedy may affect this balance.[15] An injunction against the nuisance may issue where the injury to the defendant and the public is slight or disproportionate to the injury suffered by the plaintiffs because of the nuisance.[16] We review the trial court's decision whether to issue an injunction for an abuse of discretion.[17]

McAfee claimed that the motocross course was his sole source of income. He reported a business income loss of $11,847.00 on his 2004 income tax return, however, and declared the property "agriculture."[18] Further, in the past McAfee operated a fish business on the property without producing excessive noise.

The evidence showed that families came to McAfee's course and enjoyed the motocross sport together. One witness stated that since McAfee's track

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[15] See Conner v. Smith, 433 S.W. 2d 911, 914 (Tex. Civ. App.—Corpus Christi 1968, no writ) (adequate remedy at law); Schiller v. Raley, 405 S.W. 2d 446, 447 (Tex. Civ. App.—Waco 1966, no writ) (public necessity); Hughes v. Jones, 94 S.W.2d 534, 536-37 (Tex. Civ. App.—Eastland 1936, no writ) (economic harm to defendants).

[16] Storey, 148 Tex. at 515, 226 S.W. 2d at 619.

[17] See Vaughn v. Drennon, 202 S.W. 3d 308, 313 (Tex. App.—Tyler 2006, no pet.); Estancias Dallas Corp. v. Schultz, 500 S.W. 2d 217, 221 (Tex. Civ. App. –Beaumont 1973, writ ref'd n.r.e); Fargason, 356 S.W. 2d at 215.

[18] McAfee opened the tracks in January 2004 and started charging riders in March 2004.

had been closed down, he had to drive approximately twenty-eight miles farther each way to get to another motocross course. The activity at the tracks, however, was so loud that on four days each week appellees effectively could not use the land outside of their homes. Further, on at least three occasions a CareFlite helicopter landed near the tracks to evacuate an injured rider.

Considering the competing interests, the trial court could have concluded that a permanent injunction would cause only slight injury to McAfee and the public or that such injury would be disproportionate to appellees' injuries because of the nuisance. Applying the appropriate standards of review, we hold that the evidence was legally and factually sufficient to support the trial court's balancing of the equities and that the trial court did not abuse its discretion in issuing the permanent injunction.[19]

McAfee further contends under his third point that the permanent injunction is overly broad and the trial court "should have drawn the injunction so as to eliminate the sound that can emanate from [McAfee's] property, rather than prohibit the activity in its entirety." Fann testified, however, that from the distance at which appellees live, even one bike could

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[19] See Estancias, 500 S.W. 2d at 221 (holding that trial court did not abuse its discretion in granting permanent injunction where noise prevented plaintiffs from entertaining in their backyards and carrying on normal conversations in their homes).

could exceed eighty-five decibels. Thus, it would be impossible for the trial court to craft an injunction to eliminate the excessive noise without prohibiting the activity. Further, the injunction only prohibits McAfee from "operating a public or private motorcross [sic] facility" on the property and specifically allows "vehicles operated by immediate family members of [McAfee] who are residents on the real property or those related to [McAfee] by first degree consanguinity or affinity." We hold that the restrictions placed on the motocross activity are reasonable, and the permanent injunction is narrowly drawn and precise.[20]

For all of these reasons, we overrule McAfee's third point.[21]

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[20] See Schneider, 147 S.W. 3d at 287 (holding that permanent injunctions must be narrowly drawn and precise"); Operation Rescue-Nat'l v. Planned Parenthood of Houston and Se. Tex., Inc., 975 S.W.2d 546, 560 (Tex. 1998) (holding that trial court has "some latitude" in fashioning the details of appropriate injunctive relief); Shields v. State, 27 S.W.3d 267, 271 (Tex. App.—Austin 200, no pet.) (holding that an injunction should be broad enough to prevent a repetition of the evil sought to be corrected).

[21] McAfee also argues that appellees should not have been granted equitable relief because they lacked clean hands. James Appleton, an expert in forensic video and audio analysis, testified in a bill of exception at the hearing on McAfee's motion for new trial that the audio on appellees' DVD showing their sound readings had been altered. McAfee, however does not argue that the trial court improperly denied his motion for new trial. Thus, we do not address this argument. See Pat Baker Co. v. Wilson, 971 S.W. 2d 447, 450 (Tex. 1998) (holding that appellate court cannot reverse a trial court's judgment on unassigned error).

In his fourth and fifth points, McAfee challenges the legal and factual sufficiency of the evidence supporting the permanent injunction, arguing that appellees had an adequate remedy at law and had not suffered an irreparable injury.

Permanent injunctive relief requires a showing of, among other elements, irreparable injury and the absence of an adequate remedy at law.[22] "Irreparable injury" occurs when the injury is of such a nature that the injured party cannot be adequately compensated in damages, or the damages cannot be measured by any certain pecuniary standard.[23] A remedy is "adequate," for purposes of determining entitlement to an injunction, when it is complete, practical, and efficient to the prompt administration of justice.[24] The existence of a remedy at law is not ground for denial of injunctive relief unless the legal remedy is as practical and efficient to the ends of justice as the equitable remedy.[25]

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[22] Triantaphyllis v. Gamble, 93 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2002, pet. Denied).

[23] Montfort v. Trek Res., Inc., 198 S.W.3d 344, 353 (Tex. App.—Eastland 2006, no pet.); Fox v. Tropical Warehouses, Inc., 121 S.W. 3d 853, 857 (Tex. App.—Fort Worth 2003, no pet.).

[24] Matagorda County Hosp. Dist. v. City of Palacios, 47 S.W.3d 96, 103 (Tex. App.—Corpus Christi 2001, no pet.).

[25] Khaledi v. H.K. Global Trading, Ltd., 126 S.W.3d 273, 284 (Tex. App.—San Antonio 2003, no pet.); Irving Bank & Trust Co. v. Second Land Corp., 544 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e).

The equitable remedy of injunctive relief is ordinarily available only when the legal remedy of damages will not be adequate.[26] When a nuisance is of a recurring nature, however, the plaintiffs need not seek damages, and injunctive relief may be appropriate.[27] At trial, appellees sought only injunctive relief.

Appellees testified that the excessive noise from the track was a "constant" on the four days each week when the track was in operation. Further, appellees expert Fann testified that (1) no wall or other mechanism could feasibly be installed to reduce the noise levels to an acceptable threshold; (2) there was no way to assign a dollar value to the noise pollution, lack of sleep, and difficulty conversing experienced by appellees; and (3) the only way to discontinue the nuisance was to shut the motocross track down.[28]

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[26] Holubec v. Brandenberger, 58 S.W.3d 201, 210 (Tex. App.—Austin 2001), rev'd on other grounds, 111 S.W.3d 32 (Tex. 2003).

[27] Holubec v. Brandenberger, 214 S.W.3d 650, 656 (Tex. App.—Austin 2006, no pet.) (holding that injunctive relief was appropriate because nuisance was of recurring nature); Hill v. Villarreal, 362 S.W. 2d 348, 349 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.); Landwer v.Fuller, 187 S.W.2d 670, 673 (Tex. Civ. App.—Amarillo 1945, writ ref'd w.o.m.).

[28] McAfee contends that appellees' injuries are compensable through damages, citing appellee Richard Foster's testimony contained in a bill of exception made during a temporary injunction hearing—that his property declined in value be over $150,000.00 because of the motocross track.

McAfee's expert Ware stated that sound dissipates over distance according to many factors, and McAfee could implement measures to reduce the sound from the tracks.

The evidence showed that McAfee's tracks effectively precluded appellees' use of their property and shutting down the tracks was the only feasible solution. The noise from the tracks was recurring, and appellees did not seek money damages at trial. Further, the trial court would not have abused its discretion in concluding that damages were not "as practical and efficient" as injunctive relief in this case.[29] Applying the appropriate standards of review, we hold that the evidence was legally and factually sufficient to show that appellees had suffered an irreparable injury and had no adequate remedy at law.[30] We overrule McAfee's fourth and fifth points.

The trial court, however, sustained appellees' objection to this testimony, and McAfee does not argue that it was improperly excluded. Therefore, we do not consider this argument. See Pat Baker Co., 971 S.W.2d at 450; Sommers v. Concepcion, 20 S.W.3d 27, 41 (Tex. App.—Houston [14th Dist.] 2000 pet. denied) (holding that a party's remedy for an adverse ruling is to assign error regarding that adverse ruling).

[29] Khaledi, 126 S.W.3d at 284; Irving Bank & Trust Co., 544 S.W.2d at 688.

[30] Cf. Storey, 148 Tex. at 512-13, 226 S.W.2d at 617-18 (holding that plaintiffs had adequate remedy at law where rendering plant's inconvenience and odors occurred only occasionally, surrounding land had sold for increased value since

In his sixth point, McAfee claims that the trial court abused its discretion by refusing to submit his proposed jury question regarding the social benefit of the motocross track.[31]

Although a party to an equitable action has the right to a trial by jury, only ultimate issues of fact are submitted for jury determination.[32] The jury does not determine the expediency, necessity, or propriety of equitable relief.[33] The cases that McAfee cites do not support his argument that social benefit is an ultimate issue of fact that must be submitted to the jury.[34]

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plant was built, and plant owner was "carrying out the latest and best recognized scientific practices to keep down odors and flies").

[31] The proposed question stated, "Do you find from a preponderance of the evidence that the operation of the McAfee MX motor [sic] has no beneficial social impact?"

[32] State v. Tex. Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex. 1979); Doll v. Hurst, No. 03-02-00576-CV, 2003 WL 21939711, at *8 (Tex. App.—Austin Aug. 14, 2003, pet. denied) (mem. Op.).

[33] Tex. Pet Foods, Inc., 591 S.W.2d at 803.

[34] See Elbaor v. Smith, 845 S.W.2d 240, 243-44 (Tex. 1992) (holding that contributory negligence question should have been submitted to jury); Tex. Pet Foods, Inc., 591 S.W.2d at 803-05 (holding that the probability of defendant's continued action, relevant to issuance of permanent injunction, was a question for the trial court rather than the jury); Shields, 27 S.W.3d at 273 ("The principle that the court rather than the jury exercises equitable powers answers [appellant's] complaint that the court could not include these prohibitions in the order without submitting specific jury questions thereon.");

To the contrary, at least on court of appeals has discussed "social utility" in the context of the trial court's balancing of the equities.[35] McAfee has failed to show error[36]; therefore, we overrule his sixth point.

Having overruled all of McAfee's points, we affirm the trial court's judgment.

PER CURIAM

PANEL A: CAYCE, C.J.; LIVINGSTON AND MCCOY, JJ.

DELIVERED: February 7, 2008

Lehmann v. Wieghat, 917 S.W.2d 379, 382 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding that a controlling issue is one which requires a factual determination to render judgment in the case).

[35] See Speedman Oil Co. v. Duval County Ranch Co., 504 S.W.2d 923, 930-31 (Tex.Civ.App.—San Antonio 1974, writ ref'd n.r.e.).

[36] See Jackson v. U.S. Fid. & Guar. Co., 689 S.W. 2d 408, 412 (Tex. 1985) (holding that an appellant has the burden to show that the judgment of the trial court was erroneous).

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-07-00080-CV

McAfee MX d/b/a McAfee Moto Cross and Michael Mark McAfee	From the 235th District Court
v.	of Cooke County (06-170)
Richard Foster, Phillip Fitzgerald, James and Sherri Estrada, Ray and Gabrielle Fletcher, Steve and Sandy Fairfield, Tim Hitchcock, and Haden Cowdry	February 7, 2008
	Per Curiam

JUDGMENT

This court has considered the record on appeal in this case and holds that there was no error in the judgment of the trial court. It is ordered that the judgment of the trial court is affirmed.

It is further ordered that appellants will bear the costs of this appeal, for which let execution issue.

CAUSE NO. 06-170

RICHARD FOSTER, PHILLIP FITZGERALD, JAMES AND SHERRI ESTRADA, RAY AND GABRIELLE FLETCHER, STEVE AND SANDY FAIRFIELD, AND TIM HITCHCOCK, HADEN COWDREY,	IN THE DISTRICT COURT
Plaintiffs,	
Vs	COOKE COUNTY TEXAS
McAFEE MX d/b/a McAfee MOTO CROSS and MICHAEL MARK McAFEE, individually,	
Defendants.	235TH JUDICIAL DISTRICT

FINAL JUDGMENT AND ISSUANCE OF PERMANENT INJUNCTION

On October 9, 2006, a jury was sworn and empanelled to hear the Plaintiffs, RICK FOSTER, PHILLIP FITZGERALD, JAMES ESTRADA, SHERRI ESTRADA, RAY FLETCHER, GABRIELLE FLETCHER, STEVE FAIRFIELD,

SANDY FAIRFIELD, TIM HITCHCOCK, and HADEN COWREY'S (collectively, "Plaintiffs"), application for a Permanent Injunction. Plaintiffs appeared in person and by and through their attorney of record. Defendants, McAFEE MX d/b/a McAFEE MOTO CROSS and MICHAEL MARK MCAFEE (collectively, "Defendants"), appeared in person and through their attorneys of record. This Court has taken judicial notice of the entire file in this matter. See Tex. R. Evid. 201.

On October 11, 2006, the jury received definitions, instructions, and special issues for their consideration. Upon receiving the evidence and exhibits admitted at trial, the jury began its deliberations. Upon a verdict of 11-1, the jury found that the Defendants' operation of a motorcross track constitutes a nuisance to the individual Plaintiffs. The Charge of the Court ("Charge") and the jury's answer to the special issue in included in the Court's jacket, the Court has taken judicial notice of the jury's answer and findings, and the Charge is incorporated by reference as set forth fully herein for all purposes.

Based upon the jury's answer to the special issue, this Court is of the following opinion: **A PERMANENT INJUNCTION SHALL ISSUE TO PERMANENTLY ENJOIN DEFENDANTS FROM OPERATING A MOTOCROSS TRACK.** The Court therefore issues the following **ORDER** to wit:

Defendants, McAFEE MX d/b/a McAFEE MOTO CROSS and MICHAEL MARK McAFEE, are **PERMANENTLY ENJOINED from directly or indirectly operating a public or private motorcross facility for motorcycles, dirt bikes, four wheelers, and/or other off road recreational vehicles on their real property** described as 33.38 acres of land located at 8352 FM 902, Collinsville, Texas, 76233, and recorded at Abstract 0097 BOGGS ME, BEGINNIN on the North line of the said Boggs Survey at the Northwest corner of said Share No. Four (4); THENCE East 566 feet for corner; THENCE South 620 feet; THENCE East 566 feet; THENCE North 620 feet to North line of said survey; THENCE East 566 feet; THENCE South 1320 feet to South line of said Share No. 4; and THENCE West 1320 feet to the beginning of said property.

Plaintiffs have shown that they have and will suffer irreparable harm if Defendants, McAFEE MX d/b/a McAFEE MOTO CROSS and MICHAEL MARK McAFEE, are not restrained and enjoined because Defendants have operated and allowed to be operated, and would continue to allow to be operated, a public motorcross facility for motorcycles, dirt bikes, four wheelers, and/or other off road recreational vehicles on their above described real property in a manner which causes excessive noise to intrude on and over Plaintiffs' adjoining real property, and there is no adequate remedy at law such that this **PERMANENT INJUNCTION** shall issue.

It is therefore **ORDERED, ADJUDGED,** and **DECREED** that Defendants, McAFEE MX d/b/a McAFEE MOTO CROSS and MICHAEL MARK McAFEE, all of their agents and servants, heirs, assigns, and successors in interest who may later acquire the above mentioned real property **SHALL NOT** allow any operation of motorcycles, dirt bikes, four wheelers, and/or other off road recreational vehicles on the above described real property, and Defendants shall **CEASE AND DESIST** from the operation of same, **SAVE** and **EXCEPT**: those vehicles operated by immediate family members of Defendants who are residents on the real property or those related to Defendants by first degree consanguinity or affinity.

The Court further finds that Plaintiffs have and recover their taxable court costs from Michael Mark McAfee in the amount of **$2,435.70.**[1]

Any failure to obey this **ORDER SHALL CONSTITUTE A CONTEMPT OF THIS COURT,** subject to fine, imprisonment, or both.

The Court orders execution of this judgment. This order fully and finally disposes of all claims and causes of action between the parties.

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[1]Process Server for service of subpoena Gayle Kelley $120.00; Court Reporter's Record of the Temporary Injunction $1,018.00 and $289.00; deposition of Mark McAfee $823.70; mediation fee $450.00; service of citation and temporary restraining order $165.

APPRROVED AS TO FORM ONLY:

/S/: Brian P. Lauten

Brian P. Lauten
Attorney for Plaintiffs

/S/: David Farris

David Farris
Attorney for Defendants

So ordered on this the 19th day of December 2006.

/S/: Janelle M. Haverkamp

DISTRICT JUDGE

[SEAL] THE TEXAS SUPREME COURT
OF
TEXAS
Post Office Box 12248
Austin, Texas 78711

June 27, 2008

Mr. Michael M. McAfee
P.O. Box 1772
P.C.
Gainesville, TX 76241

Mr. Brian P. Lauten
The Lauten Firm,

2626 Cole Avenue,
Suite 850
Dallas. TX 75204

RE: Case Number: 08-0310
Court of Appeals Number: 02-07-00080-CV
Trial Court Number: 06-170

Style: MICHAEL M. MCAFEE
v.
RICK FOSTER, ET AL.

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

Sincerely,

/S/: Blake A. Hawthorne
Clerk

[Seal] THE SUPREME COURT
OF
TEXAS
Post Office Box 12248
Austin, Texas 78711

August 15, 2008

Mr. Michael M. McAfee
P.O. Box 1772
P.C.
Gainesville, Tx 76241

Mr. Brian P. Lauten
The Lauten Firm,

2626 Cole Avenue
Suite 850
Dallas, TX 75204

RE: Case Number: 08-0310
Court of Appeals Number: 02-07-00080-CV
Trial Court Number: 06-170

Style: MICHAEL M. MCAFEE
v.
RICK FOSTER, ET AL.

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

Sincerely,

/S/: Blake A. Hawthorne
Clerk

[SEAL] UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

February 27, 2007

Mr. Mark McAfee
McAfee MX
8352 FM 902
Collinsville, TX 76233

Dear Mr. McAfee:

This letter is in response to your letter of February 27, 2007 in which you request clarification of statements by Plaintiffs, in a court action against you, regarding certain alleged regulatory actions by the Environmental Protection Agency concerning noise. Specifically, you requested confirmation that the Plaintiffs statement "...the EPA has adopted regulations with respect to motorcycle use and that the federal agency recognizes that noise in excess of fifty-five decibels harms the public health, safety and welfare."

The Environmental Protection Agency (EPA) promulgated regulation at Volume 40 Code of Federal Regulations, Part 205, Subpart D, that established noise emission limits for both on and off road motorcycles.

The noise emission limits found at §205.152 are based upon model year and engine displacement. The noise limits are determined under specified test conditions that demonstrate compliance by the manufacture. The noise emissions of the motorcycle may be more of less than the emission limits depending upon the mode of vehicle operation. The regulation exempts all motorcycles that are specifically intended for competition.

The EPA has not, nor does it have legislative authority to establish community noise limits. The noise levels referred to by the Plaintiffs may have been obtained from an EPA document entitled "Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety." (EPA/ONAC 550/9-74-004, March 1974). The A-weighted 55 decibel (55 dBA) sound level represents a "time averaged," continuous sound that is measured over a specified time period, generally 24 hours. This level is referred to as the "Equivalent Sound Level (Leq). And is a single number value that contains all variations in sound amplitude that occur during the specified time period. Consequently, a Leq 55 dBA may contain peak levels in excess of 100 dBA as well as low levels of 20 dBA that when time averaged result in the 55 dBA. This is explained in detail in the referenced document.

It should be noted that the EPA document does not mandate community noise limits. The levels stated therein are the result of a national noise survey where community noise levels were measured and then correlated with the response of persons exposed to the noise. The 55 dBA does not represent a level of noise that poses a health or safety risk to the public. Rather, it represents the "time averaged" noise level where the average person will express some level of annoyance. Typically, the average person will adjust the volume of their television set to a sound level between 60 and 70 dBA. Today's automobiles present a "pass-by" noise level between 65 and 80 dBA under typical cruise conditions. Trucks produce noise levels between 75 and 85 dBA. However, when time averaged with other community sounds over 34 hours, the Leq may be less than 55 dBA.

One final point. The Leq 55 dBA is the recommended residential comfort level during waking hours (7:00 a.m. to 10:00 p.m.). There is a 10 dBA penalty for Leq between (10:00 p.m. and 7:00 a.m.) that brings it to 45 dBA. For light commercial areas, the recommended levels are Leq 65 and 55dBA. For heavy commercial, the recommended levels are Leq 75 and 65 dBA.

I trust the above information is responsive to your questions.

Sincerely.

/S/: Kenneth E. Feith

Kenneth E. Feith
Senior Scientist/Policy Advisor
Office of Policy Analysis & Review.

114 (2)

Supreme Court, U S
FILED
DEC 1 1 2008
OFFICE OF THE CLERK

No. 08-639

In The
Supreme Court of the United States

Michael M. McAfee, d/b/a McAfee MX
Petitioner

Vs.

Rick Foster,
Phillip Fitzgerald
James and Sherri Estrada
Ray and Gabrielle Fletcher
Steve and Sandy Fairfield
Tim Hitchcock and Haden Cowdry
Respondents.

On Petition for Writ of Certiorari
To the Court of Appeals,
Second District of Texas-Fort Worth

Supplemental Appendix

Michael M. McAfee, Pro Se
8352 FM 902
Collinsville, Texas 76233

Telephone: (214) 543-1575

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Sup. Appendix A (1): Motion to Challenge Subject Matter Jurisdiction By Federal Questions & Federal Preemption, filed on March 28, 2008 in Court of Appeals, 2nd District of Texas-Fort Worth, Texas in #02-07-00080-CV McAfee v. Foster, et al....

Supplemental Appendix...1

Sup. Appendix B (1): Judgment of Court of Appeals, 2nd District of Texas Forth Worth, Texas On Motion to Challenge Subject Matter Jurisdiction By Federal Questions & Federal Preemption, PER CURIAM dated May 22, 2008, Denying Said Motion to Challenge Subject Matter Jurisdiction

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S. App. 1

#02-07-00080-CV
COURT OF APPEALS
2ND DISTRICT OF TEXAS
FORT WORTH

MCAFEE MX
d/b/a MCAFEE MOTO CROSS
AND MICHAEL M. MCAFEE — APPELLANTS

V.

RICHARD FOSTER, ET AL — APPELLEES

MOTION TO CHALLENGE
SUBJECT MATTER JURISDICTION
BY FEDERAL QUESTIONS
& FEDERAL PREEMPTION

TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES Michael M. McAfee (Pro Se) for McAfee MX, APPELLANT and files this Motion to Challenge Subject Matter Jurisdiction by Federal Questions & Federal Preemption and therefore would respectfully show the Court as follows:

I.

Appellant is entitled to file this motion, as a party need not argue in the trial court, in order to later argue on appeal, that claims are not ripe for adjudication or that a party lacks standing to assert them. "An appellant court may consider, in the first instance, challenges to ripeness and standing and other such prerequisites to subject matter jurisdiction, which is essential to a court's power to decide a case." See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W. 2d 440, 443-446 (Tex. 2000); see also *State Bar of Texas v. Gomez*, 891 S.W. 2d 243, 245 (Tex. 1994). "Indeed, an appellate court *must* examine such issues, even of on its own initiative, to ensure that its decision of the merits is not merely advisory" (emphasis added by author). See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W. 2d 440, 443-446 (Tex. 1993); see also *Steel Co. v. Citizens for a Better Environment*, 323 U.S. 98 (1998).

II.

Appellant McAfee contends that while the State of Texas has authority to regulate noise generally; its trial courts lack subject matter jurisdiction when said claim is based upon a Plaintiff's raising federal questions. It is more specifically so when the questions are of alleged "EPA violations" concerning motorized vehicle

emissions and noise, as Appellees repeatedly contend upon the face of their well-plead complaint.

Appellant further contends that by the trial court's action in the instant case, the State of Texas is attempting to impose a state standard conflicting with the intent and objectives of federal law.

Congress has occupied the field of motorized vehicle engine emissions and noise, and specifically 2 and 4-stroke motorcycle engines, under 42 USC 4901-4918 (The Noise Control Act of 1972) and its related regulatory scheme under 40 CFR 205.150 et seq. Any attempt by the State of Texas to regulate in the narrow field of vehicle engine emissions and noise is in conflict with federal intent and purposes under said regulatory scheme. Appellant concludes and would show this Court that Appellees' state tort law claim is thus barred by federal field and conflict preemption.

III.

The Supremacy Clause of the U.S. Constitution (See *U.S. CONST., VI cl.* 2) gives Congress preemptive power over any state law conflicting with the exercise of federal power. See id; see also *Fidelity Fed. Sav. & Loan v. De La Cuesta*, 458 U.S. 141, 152-153 (1982). The U.S. Supreme Court has established that state law may be preempted by explicit, field, and conflict preemption. See *English v. General Elec. Co.*, 496 U.S. 72 (1990). Under field preemption, state law is preempted

when it regulates conduct in a field that Congress intends the federal government to occupy exclusively. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). "[F]ederal law or regulation may impliedly preempt state law or regulations is the state's scope indicates that Congress intended federal law or regulations to occupy the field exclusively." See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Even if Congress does not completely occupy a given regulatory field, state law is preempted to the extent it conflicts with federal law. See *Geier v. American Honda Co., Inc.* 120 S. Ct. 1913, 1920 (2000).

Appellant contends that any state law (to include state tort law claims) is a form of state regulation subject to the Supremacy Clause. See *Geier,* 120 S. Ct. at 1928; see also *San Diego Bldg. Trades Counsel v. Garmon,* 359 U.S. 236, 247 (1959). It matters not whether the "state law" is a statue, ordinance, common law, or tort law; it is preempted when such state standard is in conflict with the objectives of the federal law. See id.; see also *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 256 (1984).

Congress has made clear its intent to preempt the field of motorized vehicle engine noise: (1) *"the Congress finds" it is a "major source of noise" see 42 USC 4901 (a)(2); (2) that "Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment"* see 42 USC 4901 (a)(3)

(emphasis added by author); (3) "The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare." see 42 USC 4901 (b); (4) in "authoriz[ing] the Federal Noise emission standards for products distributed in commerce" id: (5) in stating "The Administrator shall...publish information on the levels of environmental noise the attainment and maintenance of which in *defined areas under various conditions* are requisite to protect the public health and welfare with an adequate margin of safety." see 42 USC 4904 (a)(2) (emphasis added by author); and (6) specifically includes "Transportation equipment *(including recreational vehicles and related equipment" and " Any motor or engine" thereof see 42 USC 4905 (a)(1)(C)(ii) and (iii).*

While federal law says states may "establish and enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products" see 42 USC 4905 (e) (2), they may do so only when said statue, regulation, etc., does not conflict with existing federal laws or regulatory schemes.

If the state allows a jury verdict establishing new standards, not identical and more restrictive than the existing federal scheme regarding

motorized vehicle engine emissions and noise, then every motorcycle operating in the State of Texas would be subject to a claim of "private nuisance" by anyone disliking motorcycles. This increases costs and discourages technological development, which is obviously in conflict with Congressional intent when it enacted the NCA. If a state law is an obstacle to the accomplishment and execution of the full purpose and objective of Congress by interfering with the methods employed in the federal scheme, the state law is preempted. See *Geier*, 120 S. Ct. at 1921; see also *Michigan Canners & Freezers Assoc., Inc. v. Agriculture Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984). As the state of Texas nor Cooke County has not adopted any statutory noise ordinances, Appellees are attempting to "legislate by litigation" to create a new regulatory scheme contrary to Congress' intent in a preempted field. In this attempt, the State of Texas makes it impossible for Appellant to comply with the existing federal regulatory scheme and the "new" scheme the state attempts to create. A state law is preempted if the regulated party cannot comply with both the state and federal regulation. See *Hillsborough County v. Automated Med. Labs., Inc.* 471 U.S. 701, 713 (1985). For these reasons, the case should be dismissed.

A plea of preemption may be defeated if no mechanism exists for private citizens to take action in the Federal Courts; i.e., these is no "complex and interrelated federal scheme of law, remedy, and administration". See *Merrell Dow Pharmaceuticals*

Inc. v. Thompson, 478 U.S. 804 (1986); see also *Mills, et al. v. Warner Lambert Co., et al* Case #03-1052 (Tex. 2005). However, the NCA *does* have a mechanism for private citizens to file actions and seek remedies against alleged violators in Federal Court under a federal common law claim of nuisance see 42 USC 4911 and 28 USC 1331. "....[A]ny person...may commence a civil action on his own behalf" see 42 USC 4911 (a). *"The district courts of the United States shall have jurisdiction, without regard to the amount in controversy, to restrain such person from violating such noise control requirement or to order such Administrator to perform such act or duty, as the case may be"* see 42 USC 4911 (a)(2)(B).

While Appellant admits that 42 USC 4911 (e) states "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise control requirement or to seek any other relief (including relief against an Administrator)", he contends that this remedy applies *only* after a party has filed suit in federal district court see 42 USC 4911 (a)(2)(B), and proper notice has been given to "(i) to the Administrator of the Environmental Protection Agency...and (ii) to any alleged violator of such requirement" see *42 USC 4911 (b)(1)(a)(i) and (ii).*

IV.

Appellant further contends that the Trial Court did not and does not have subject matter jurisdiction in the instant case, as he would show Appellees failed to rely exclusively on state law in their pleading, by raising federal questions in a preempted field on the face of the pleading. Appellant would point the Court to the face of Appellees' pleading:

"Count two: NUISANCE PER SE/CRIMINAL & EPA VIOLATIONS."

"Plantiffs would show that defendant's motorcycle operation is a nuisance per se and a public nuisance to the community at large. Specifically, the E.P.A. has adopted regulations with respect to motorcycle use and that *federal agency* recognizes that noise in excess of fifty-five decibels harms the *public health, safety, and welfare.*" (See Exhibit "A") (emphasis added by author).

"This so-called "arising under" or "federal question" jurisdiction has long been governed by the well-pleaded-complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." See *Caterpillar v. Williams*, 482 U.S. 386 (1987); see also Gully v. First National *Bank*, 299 U.S. 109 (1936). "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." See *Caterpillar v.*

Williams, 482 U.S. 386 (1987); see also *The Fair Kohler Die & Specialty Co.*, 228 U.S. 22 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon.") Exclusive reliance on state law can not exist when Appellees have clearly raised federal questions. The record is clear that Appellees; unceasing pleading of "EPA violations of "odor, fumes and noise" adversely affecting the public health and welfare raises federal questions under *42 USC "Title 42- The Public Health and Welfare". See Exhibit "A", attached and incorporated herein, a certified copy of Plaintiff's 1st Amended Petition of May 4th, 2006, p. 4, 5, 6 and 7.* Appellees' expert's reliance on EPA exhibits and studies authorized under *42 USC* in his testimony is undeniable proof that Appellees did not rely exclusively on state law. See Exhibit "B", attached and incorporated herein, (Plaintiff's Exhibits #3, #4, and #11). *Appellant kindly reminds this Court that he consistently objected to these federal subject matter jurisdiction arguments, exhibits, testimony, etc. See RR 1, p. 14; RR 2, p. 40; RR 3, p. 20, 55-58; and RR 9, p. 5, 28-37, 45, 64, 66, 68, 70-72, and 74; see also Exhibit "A".* Appellant contends that Appellees clearly have advanced federal questions on the face of their pleading, which this Court has accepted as true; or in the alternative, Appellees have crafted an "artful pleading" in which they attempt to hide behide the color of state court jurisdiction while advancing federal questions. A Plaintiff cannot disguise as a state claim a cause of

A cause of action that is necessarily federal in nature. See *Geopel v. National Postal Mail Handlers Union*, 36 F3d 306 (3d Cir. 1994).

In candor to this Court, Appellant states that while Appellees plead that Appellant was a private and public nuisance and a nuisance per se, the jury question spoke exclusively as to whether Appellant was a nuisance to Appellees, and that the subsequent finding at trial was that Appellant was a private nuisance to Appellees. The record is clear that Appellees failed to plead public nuisance under Section 125 of the Tex. Civ. Prac. & Rem. Code, and that Appellant was never warned or cited under Texas Penal Code 42.01. Additionally, the Texas Supreme Court has repeatedly stated that criminal statutes do not always represent the standard for civil liability. See *Reeder v. Daniel*, 61 S.W. 3d 359, 45 Tex. Sup. Ct. J. 85 (Tex. 2001); see also *Carter v. Williams Sommerville & Son, Inc.*, 584 S.W. 2d 274, 22 Tex. Sup. Ct. J. 456 (Tex. 1979).

It is obvious that Appellees have relied heavily upon the alleged "EPA violations" to obtain injunctive relief. Appellees have used apples (a state tort law claim) to try to prove oranges exist (alleged EPA violations under a Federal regulatory scheme). Appellant contends that whether or not Appellees' allegations of "EPA violations" have merit is a matter for the Federal Courts to adjudicate. The purpose of a plea to the jurisdiction is to dismiss a cause of action without regard to whether the claim

has merit. See *Bland ISD v. Blue*, 34 S.W. 3d 547, 554 (Tex. 2000).

Appellant contends that under *28 USC 1331*, [federal question] "The district courts *shall have original jurisdiction* of all civil actions arising under the Constitution, laws, or treaties of the United States. Words "all civil actions" were submitted for "all suits of a civil nature, at common law on in equity." *42 USC 4901-4918* are statutes of the United States initiating a federal program of regulating noise pollution with the intent of protecting human health and minimizing annoyance of noise to the general public. The EPA, and not the state, retains responsibility and authority for enforcing alleged violations of the very EPA regulations which Appellees have plead on the face of their complaint.

While states and local governments have the option of enforcing EPA regulations by adopting identical limitations as their own laws or ordinances See *42 USC 4905 (e)(1)(A)* and *(B)*, there is no evidence in the record that the State of Texas nor Cooke County, Texas have adopted such "identical regulations, or in the case of Cooke County, any noise ordinances whatsoever. Appellant thus contends that the State of Texas has waived its jurisdiction in any action regarding allegations of "EPA violations". Appelles therefore have no standing to sue, rendering this case to be moot.

Lack of subject matter jurisdiction is fundamental error and can be raised at any time.See *Sivley v. Sivley*, 972 S.W. 2d 850, 855 (Tex. App.- Tyler 1998, orig. proceeding). "Subject matter jurisdiction cannot be presumed or waived." See *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W. 444, 449 n.2 (Tex 1996). "Lack of jurisdiction makes a judgment void, not just voidable." See *Mapco, Inc. v. Forrest*, 795 S. W. 2d., 700, 703 (Tex. 1990).

V.
ADDITIONAL OPINIONS OF AUTHORITY

The Texas Supreme Court, in *Texas Ass'n of Business v. Texas Air Control Board* 852 S.W. 2nd 440 (Tex. 1993) opined "Because standing is a constitutional prerequisite to maintaining a suit under both Federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield."

Appellant now turns to said jurisprudence of the U.S. Supreme Court, which in *Taylor v. Anderson*, 234 U.S. 74 (1914), stated:

"whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statue[,]....must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."

See also *Baker v. Putnal* 75 F. 3d 190, 196 (5th Cir. 1996) "Also, the court may not look beyond the pleading in ruling on a motion."

VI.

CONCLUSION

McAfee respectfully contends that Appellees have attempted under the *color* of a common law action in state court while raising federal questions in a field preempted by Congress by federal statute and regulation. This case involves federal questions under the authority and regulation of the EPA and should have been filed in federal court. Appellees entire case relies on alleged violations of federal (EPA) standards, federal questions, an implied cause of federal action, expert testimony relying on EPA exhibits, etc. These federal question *"were made"* by Appellees as *"master of their complaint"*, and not Appellant, and should be construed in favor of Appellant, as they pleaded them *on the very face of their complaint.* McAfee contends that it should be viewed and construed under the *prism* of the U.S. Constitution (due process, substantial fair play and justice and the Supremacy Clause), for Appellees' are the *"masters of their complaint"*, from its inception, a federal claim. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The U.S. Supreme Court also "opined" the same opinion in *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22, 25 (1913), when it "opined": *["Of course the party*

who brings a suit is master to decide what law he will rely upon"]. The Texas Supreme Court has also "opined" in No. 03-1052: "Finally, state law is also impliedly preempted if it actually conflicts with federal laws or regulation, because (1) it is impossible for a private party to comply with both state and federal requirements". In the instant case McAfee fully operated a legal business under all Texas laws for 27 months with no violations of Texas law nor any of Cooke County. McAfee however, cannot comply with the alleged federal question of EPA violation of 55 decibals in the operation of his business, therefore federal jurisdiction is mandated.

The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." See *Mansfield, C.L.M.R Co. v. Swan*, 111 U.S. 379, 382 (1884). "Without jurisdiction that court cannot proceed at all in any cause. Jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." See *Ex parte McCardle 7 wall.* 506, 514 (1869).

THEREFORE, Appellant respectfully prays that this Honorable Appeals Court, 2nd District, Fort Worth, Texas thereby grant this motion which Appellant may show Himself justly entitled, by Dismissing this cause for lack of subject matter

jurisdiction, and any and all relief entitled to Himself.

Respectfully Submitted By:

Michael M. McAfee- Pro Se
P.O. Box 1772
Gainesville, Tx 76241
Ph: 214-543-1575

CERTIFICATE OF CONFERENCE

I certify that a phone conference was attempted with Brian Lauten, attorney for Appellees', on March 10, 2008 at approx. 10:49 am., regarding the merits of this motion and he was unavailable. It is therefore unknown if he is unopposed or opposed to this motion. As of March 24, 2008, I have not heard back from Mr. Lauten, so I assume this motion is unopposed.

CERTIFICATE OF SERVICE

Pursuant to Rule 9 of the Texas Rules of Appellate Procedure, the undersigned certifies the following: (1) that on the date written in this certificate, I served a true and correct copy of the above and foregoing document in accordance with the requirements of Rule 9 of the Texas Rules of Appellate Procedure on this the 25th day of March, 2008.

Brian P. Lauten VIA: 7006 2760 0005 1869 3703
The Lauten Firm, PC
2626 Cole Ave., Suite 850
Dallas, Tx 75204

/S/: Michael M. McAfee- Pro Se

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-07-00080-CV

MCAFEE MX D/B/A MCAFEE MOTO CROSS AND MICHAEL MARK MCAFEE	APPELLANTS

V.

RICHARD FOSTER, PHILLIP FITZGERALD, JAMES AND SHERRI ESTRADA, RAY AND GABRIELLE FLETCHER, STEVE AND SANDY FAIRFIELD TIM HITCHCOCK, AND HADEN COWDY	APPELLEES

FROM THE 235TH DISTRICT COURT
OF COOKE COUNTY

ORDER

We have considered appellant's "Motion To Challenge Subject Matter Jurisdiction By Federal Questions & Federal Preemption."

The Motion is **DENIED.**

The clerk of this court is directed to transmit a Copy of this order to the appellants and attorney of record.

DATED May 22, 2008.

PER CURIAM

PANEL A: CAYCE, C.J.; LIVINGSTON and MCCOY, JJ.